

1 P R O C E E D I N G S

2 THE CLERK: The Court has before it for
3 consideration this morning a motion hearing in civil
4 case 16-cv-545-JL, Scottsdale Capital Advisors
5 Corporation, et al. versus The Deal, LLC, et al.

6 THE COURT: All right, we're here for a motion
7 to dismiss based on lack of personal jurisdiction. Why
8 don't counsel identify themselves for the record and
9 we'll proceed.

10 MS. McNAMARA: Good morning, your Honor. My
11 name is Elizabeth McNamara and I represent the
12 defendants in this action.

13 THE COURT: All right. I want everyone to
14 identify themselves and we'll proceed. So McNamara,
15 Gordon. You guys?

16 MR. SUSMAN: Jordan Susman on behalf of the
17 plaintiffs.

18 THE COURT: How do I pronounce your last name?

19 MR. SUSMAN: Susman.

20 THE COURT: Thank you.

21 MR. HAWKINS: Good morning, your Honor. Chris
22 Hawkins, local counsel for the plaintiff.

23 THE COURT: Right. How are you, sir?

24 MR. HAWKINS: I'm very well. Yourself?

25 THE COURT: It's been a while since I've seen

1 you. Who's going to be doing the argument today?

2 MR. HAWKINS: Attorney Susman.

3 THE COURT: All right. Attorney McNamara,
4 please proceed.

5 MS. McNAMARA: Thank you very much, your
6 Honor.

7 There's no dispute about the controlling facts
8 for this motion to dismiss for lack of personal
9 jurisdiction. The plaintiffs have absolutely no
10 connection to New Hampshire. They are residents of
11 Arizona and Nevada. The news articles concerning the
12 government's investigation into the plaintiffs' alleged
13 multi-million-dollar stock fraud has absolutely no
14 connection to New Hampshire. There's no sources from
15 New Hampshire. There's no reference to New Hampshire.
16 The reporter, Bill Meagher, also has no connection to
17 New Hampshire. Never set foot in the state. Obviously
18 missing something.

19 THE COURT: He's California, right?

20 MS. McNAMARA: Yes, he's California.

21 THE COURT: But it's published out of New
22 York?

23 MS. McNAMARA: It's published out of New York,
24 although it was edited and reported in California.

25 THE COURT: Right.

1 MS. McNAMARA: And The Deal, The Deal LLC has
2 no offices in New Hampshire, no employees, doesn't pay
3 taxes in New Hampshire, has no connection. Instead, the
4 plaintiffs attempt to establish personal jurisdiction
5 exclusively on the fact that The Deal has one and only
6 one subscription in the state, and that's with Dartmouth
7 College, even though the evidence shows that no one at
8 Dartmouth College that had access to its subscription
9 even downloaded or read the articles at issue. In short
10 that would be --

11 THE COURT: It was an online subscription,
12 right?

13 MS. McNAMARA: It's an online subscription
14 although it wasn't sold online.

15 THE COURT: What's that mean?

16 MS. McNAMARA: It means that it's like a
17 traditional kind of newspaper, magazine, newspapers,
18 they either had contact from Dartmouth at a conference
19 or there was a call or something, it wasn't subscribed
20 online.

21 THE COURT: All right. I get it.

22 MS. McNAMARA: So in other words --

23 THE COURT: I'm just trying to figure out, and
24 it seems like it was never read. It seems like not only
25 was this article never read, but the publication has

1 never been read. Is that right?

2 MS. McNAMARA: No, I don't think we can go so
3 far as to say the publication has never been read only
4 through the Dartmouth subscription, we don't really have
5 evidence to that effect. What was looked for and what
6 was determined was that the three articles at issue in
7 this litigation, there's access codes associated with
8 Dartmouth and you could see whether they accessed those
9 three articles. Those three articles were never
10 accessed, never downloaded, never read by anyone who was
11 at Dartmouth.

12 THE COURT: Okay.

13 MS. McNAMARA: So, and that's a critical
14 point, your Honor, because --

15 THE COURT: I'm just -- believe me, I
16 understand your argument. I'm just trying to understand
17 what a subscription means in this context. That means
18 that somebody at Dartmouth College or maybe Dartmouth
19 business school, I don't know, somebody at Dartmouth in
20 the library, right, or it is, I mean, if no one can --
21 if no one can walk into the Dartmouth library and find a
22 stack of these, right, it's not how it works, am I
23 right?

24 MS. McNAMARA: Correct. No one can walk in
25 and find it. What it is -- let me try to explain if I

1 may.

2 THE COURT: Yeah.

3 MS. McNAMARA: Usually -- this is a
4 publication, as one can tell by its name and the topics
5 that it covers, usually subscribers are financial
6 institutions. So let's say, you know, Shearman &
7 Sterling or major law firms might subscribe, you
8 subscribe and then depending upon the users at your
9 organization, you authorize a certain specified number
10 of users at that organization, and that those users get
11 an access code so you can go online to The Deal, input
12 your access.

13 THE COURT: So Dartmouth users get an access
14 code. Now, the universe of users at Dartmouth, I'm just
15 trying, because I actually do understand the argument,
16 I'm just trying to understand the facts a little bit
17 better.

18 MS. McNAMARA: Sure, sure.

19 THE COURT: Would these be Dartmouth students,
20 business students, faculty, or would these be people who
21 are managing Dartmouth's assets?

22 MS. McNAMARA: You know, we don't really know,
23 your Honor, but I suspect that it would be people doing
24 research reporting, not reporting, but probably research
25 students at the university.

1 THE COURT: Students.

2 MS. McNAMARA: Students.

3 THE COURT: All right. Not people managing
4 Dartmouth stock portfolio.

5 MS. McNAMARA: Not that we're aware of, your
6 Honor.

7 THE COURT: Okay. Is that your understanding
8 as well? Would that be consistent with what you think?

9 MR. SUSMAN: To the best of my knowledge, yes,
10 it would be one of the 6,000 students at Dartmouth.

11 THE COURT: Got it. Thank you. Go ahead.

12 MS. McNAMARA: So given, your Honor, that
13 there's been absolutely, there's no evidence that any of
14 these three articles were even read vis-a-vis the single
15 subscription, there is no injury in this state. There's
16 no established injury to support a finding of personal
17 jurisdiction.

18 So let me step back a moment and focus, if I
19 may, on the three components to the First Circuit's test
20 to establish personal jurisdiction.

21 The first and perhaps most important factor is
22 the purposeful availment factor. And the plaintiffs
23 understandably distance themselves. They're not relying
24 on the Calder v. Jones line of cases where the plaintiff
25 was a resident of the state, there was over 600,000

1 copies in the state, the articles were directed at the
2 plaintiff in the state. They instead try to focus on
3 the Keeton line of cases and the Zippo line of cases.
4 But we submit that neither line supports a finding of
5 personal jurisdiction here.

6 First as to Keeton which of course involves
7 New Hampshire, it instructs that jurisdiction may be
8 found when the plaintiffs have no connection with the
9 state, like the plaintiffs here, but where there is a
10 substantial number of copies of the publication that are
11 regularly sold and distributed. And indeed in Keeton
12 there was ten to fifteen thousand copies of the magazine
13 that were being regularly distributed in New Hampshire.

14 The plaintiffs like to emphasize that the
15 number reflects that that ten to fifteen thousand
16 reflected about one percent of total sales in Keeton.
17 But that statistic, one percent, never is referenced by
18 the Supreme Court which was concerned it seems with
19 actual quantity, not relative quantity. And indeed in
20 case after case when plaintiffs have attempted to
21 establish jurisdiction based on a handful of
22 subscriptions, significantly larger numbers than what
23 are at issue here, courts uniformly reject the effort.
24 Thus we have the Chaiken case, Chaiken versus Village
25 Voice which the district court in Massachusetts found

1 that four daily copies of the newspaper and 183 of the
2 Sunday was not sufficient to establish jurisdiction.

3 In the leading First Circuit case, Noonan,
4 there were 305 copies of the magazine that entered
5 Massachusetts, and there the plaintiff was a resident of
6 the state and had real damage in the state.

7 And then I think more recently we have the
8 Salgado case which involved 20 subscriptions, and yet
9 that was still not sufficient to establish personal
10 jurisdiction even though the plaintiff there as well was
11 a resident. That arose out of Puerto Rico, was a
12 resident of Puerto Rico.

13 We submit that the lesson you can draw from
14 these cases is that you need to look at the whole
15 picture. Even if the plaintiff is not relying on
16 Calder, it is highly relevant that the plaintiff is not
17 a resident here and the --

18 THE COURT: I don't understand your -- I
19 understand I guess why, I think I understand why the
20 plaintiff is trying to say this is a Keeton case, not a
21 Calder case. I don't think of jurisdiction as you
22 described it in the Keeton line and the Calder line.
23 They're the same.

24 MS. McNAMARA: They're not different. I agree
25 with you, your Honor. I don't think they're different.

1 Because what the standard is, you look at the whole
2 picture, and what Calder I think emphasized because the
3 facts gave support for it, is just how much the articles
4 at issue were actually targeted at Calder. She was a
5 resident of California. So, here the fact that the
6 plaintiffs are not residents of New Hampshire, it's
7 highly relevant to the inquiry. And what Keeton teaches
8 us, is that in that fact pattern you have to have a
9 substantial distribution of the work.

10 So, and you see that--

11 THE COURT: You've got to be able to show
12 impact, effect.

13 MS. McNAMARA: Exactly.

14 THE COURT: Right.

15 MS. McNAMARA: Exactly. And that's what --

16 THE COURT: But when you focus on one
17 subscription, there is only one, so that's what we're
18 going to focus on, but isn't it, you know, a
19 subscription to a, a physical subscription to a paper
20 magazine is one thing. A single subscription at
21 Dartmouth could be viewed by many. It's not the same as
22 one person reading their one brown wrapper magazine that
23 comes in the mail once a month. You follow what I'm
24 saying?

25 MS. McNAMARA: I do, your Honor. And we know

1 the facts that can answer that question, and it's still
2 under the case law, it's not sufficient under Keeton and
3 other cases because we know how many people had access
4 to the subscription, 40, period. And 40 is not
5 sufficient under any of these analysis. You look back
6 at the Chaiken case, you had 183; Noonan you had 305;
7 Salgado you had 20. And that in Salgado you had the
8 plaintiff was a resident of the jurisdiction.

9 So you balance these things. You weigh them
10 together. We know at maximum there could only be 40
11 people who could look at this publication at Dartmouth.
12 And you see the same -- so the plaintiff starts really
13 focusing on a lot of the internet subscription cases
14 that flow out of Zippo.

15 But here what each of those cases show is that
16 in each and every case that the Zippo kind of relatively
17 small numbers, and p.s., numbers that are still larger
18 than the numbers at issue here where jurisdiction has
19 been found, the plaintiff has consistently been a
20 resident of that state and the damage that happened
21 existed in that state. So in Zippo, for example, the
22 plaintiff was a resident of Pennsylvania. There were
23 3,000 subscriptions.

24 The plaintiff relies extensively on a case out
25 of Utah, Conlin. And in the Conlin case there were 60

1 subscriptions, but importantly when you look at that
2 case not only did the plaintiff reside in Utah, but the
3 whole purpose of the article was to primarily cause harm
4 to the plaintiff in Utah. So again, you look at the
5 whole picture, you bring it together and it supports
6 jurisdiction in those circumstances.

7 Here we have nothing in this picture set aside
8 the sole subscription to Dartmouth where no one read it
9 and so there are no actual injury from the articles at
10 issue.

11 And the other thing that Noonan teaches us
12 from the First Circuit is that where there is a large
13 number of magazines distributed in the state, it
14 indicates a deliberate exploitation of the market;
15 whereas where there are a thin distribution, it
16 indicates a lack of purposeful contact.

17 Here we have a vanishingly fine distribution
18 of the magazine into the state. It is one subscription.
19 And it simply standing alone does not support personal
20 jurisdiction nor can you satisfy the relatedness prong
21 given the fact that you need to have actual injury.

22 What Keeton says is that of course New
23 Hampshire had an interest in that case because there
24 were ten to fifteen thousand readers of the magazine.
25 There was actual injury in the state. Here we have

1 absolutely no actual injury or evidence thereof. It's
2 more akin to another case out of this district court,
3 Christian versus Barricade Books, where one book was
4 sent into the state to a bookstore and then wasn't sold
5 and was returned to the publisher. There was no actual
6 injury in the state because no one bought the book and
7 no one read it.

8 Those are the facts we're presented with here.
9 There's one subscription with 40 possible users that
10 could have downloaded it and no one did, and so there's
11 no actual injury.

12 THE COURT: Like a lot of people do, though,
13 you're, it's not that I disagree with what you're saying
14 so much but relatedness to me -- I view relatedness as a
15 precursor even to purposeful availment.

16 MS. McNAMARA: I agree with you.

17 THE COURT: Well, you're talking about
18 purposeful availment.

19 MS. McNAMARA: Well, because it kind of leads
20 into relatedness.

21 THE COURT: Well, leads in sort of factually?

22 MS. McNAMARA: Yes.

23 THE COURT: I guess it does to an extent. But
24 I guess I need to hear, when you talk about a case like
25 Keeton, a case like Keeton, you know, it's focusing on

1 effects, injury, in the context of purposeful availment,
2 and it makes sense in the context of relatedness. I
3 think I need to hear you focus a little bit more on
4 relatedness in order to -- because if there's
5 relatedness, to me, if you can knock out relatedness I
6 think you're a lot further along the road of knocking
7 the case out for lack of jurisdiction than you are, you
8 know, the purposeful availment in a very sort of
9 amorphous analysis. And it's not that I really take
10 issue with your approach to it, but I think it puts the
11 cart before the horse.

12 Why don't you talk to me about relatedness.

13 MS. McNAMARA: Yes. Well, your Honor, I think
14 the relatedness that you have is the causation analysis
15 is really what it comes down to. And what you have to
16 establish, the one fact that the record shows that there
17 has been any contact by a defendant here is the one
18 subscription to Dartmouth. So in order to have a
19 causation analysis concerning the three articles that
20 are at issue here, one would want to be able to
21 establish or have reason to believe that readers who had
22 access to that subscription actually read the article.
23 So that the injury that the Keeton court recognized is
24 that there's not injury just to a plaintiff in the libel
25 suit, there is injury to readers if what they're reading

1 is arguably false information. And here we don't have
2 any evidence since it's undisputed that there were 40
3 users who had access to the subscription, no one read
4 it, so where's the injury? There's simply no evidence
5 in this record that there were readers that gave rise
6 out of the subscription, which is what they're looking
7 at as the causation to the beginning that we had a
8 subscription that did not lead to any actual injury.
9 And what Keeton underscores is actual injury. And here
10 there simply is no actual injury. And so as your Honor
11 I think correctly observes, if you can't establish that
12 basic foundational element, then there's no basis to
13 move into the other components really. And here they
14 simply haven't established that.

15 And then briefly, I guess, in conclusion I
16 just want to touch on the reasonableness component of
17 this as well, which I think as your Honor has recognized
18 in Reynolds and elsewhere, you don't even really need to
19 reach that component if you're unable to establish the
20 relatedness or the purposeful availment, and we would
21 submit you don't really need to reach it here, but there
22 are factors I think that significantly weigh in the
23 defendant's favor in connection with that. And the
24 first is that it really goes to the individual reporter,
25 Mr. Meagher. He has absolutely no connection with this.

1 He has absolutely no relationship and no reason to
2 believe that there was even a subscription in New
3 Hampshire that the articles were to be theoretically
4 accessed here, because as I indicated earlier, this is
5 an institutional publication that's primarily
6 disseminated to financial institutions with the huge
7 bulk of the readership in New York City financial
8 communities. And so there's just nothing in this record
9 that it would be reasonable to pull Mr. Meagher all the
10 way from California to here.

11 But we would also submit that it's
12 unreasonable as to all defendants. And this really goes
13 to what we've raised in our papers, but we want to
14 underscore with some recent developments, your Honor,
15 and that really is that this action is part of a pattern
16 and practice of harassment by these particular
17 plaintiffs in order to do one and only one thing that
18 really is the goal here. It's not necessarily to
19 theoretically redress defamatory articles but rather one
20 that sets out Mr. Meagher's confidential source. So
21 after not only did they file an action in New York with
22 that primary goal as evidence on the complaint, but
23 since this action has been commenced in New Hampshire
24 they've also pursued third party subpoenas against --
25 subpoena against Mr. Meagher in California, and just a

1 few weeks ago in northern district a federal judge in
2 San Francisco quashed that subpoena, said you can't seek
3 information going after his confidential source, and
4 then even underlying the ultimate kind of alleged harm
5 and falsity of the articles here, just about five,
6 six weeks ago the FINRA court issued its ruling
7 concerning the plaintiffs here. Plaintiff Mr. Hurry is
8 now barred from the securities industry for life. The
9 Scottsdale Capital, because of egregious violations for
10 the very red flags that are allegedly cited in these
11 articles and false lies, Scottsdale Capital has been
12 fined \$1.5 million.

13 And so there are serious -- I think this case,
14 the fact that it's continuing to be brought, the fact
15 that it was brought in New Hampshire after all this
16 delay is really just part of a pattern and practice.
17 And this Court has emphasized that in the First Circuit
18 in Ticketmaster and elsewhere that where there's some,
19 you know, notion that the case is really, has an
20 ulterior purpose, that that helps to tip the balance and
21 does not support personal jurisdiction.

22 THE COURT: Yeah. I don't want to spend a lot
23 of time -- spend a lot of time, I don't plan on spending
24 a lot of analytical energy on these Gestalt factors, but
25 if there is one, that's probably the one.

1 All right, let me hear from Mr. Susman.

2 MS. McNAMARA: Thank you.

3 THE COURT: Why don't you start there,
4 actually. What's the difference between this suit and
5 the Arizona suit?

6 MR. SUSMAN: I can't hear you. What?

7 THE COURT: What's the difference between this
8 suit and the Arizona suit?

9 MR. SUSMAN: The Arizona suit is a suit
10 against FINRA for FINRA's action -- the suit against
11 FINRA began, it had numerous causes of action against
12 FINRA including 1983 claims that were thrown out, and
13 all that remains now are the defamation and false lie
14 claims against FINRA and for FINRA leaking untruthful
15 information. So this --

16 THE COURT: But it's the same suit, different
17 defendants basically, right?

18 MR. SUSMAN: Yes, in many ways.

19 THE COURT: Okay.

20 MR. SUSMAN: Sure. Let me just address that
21 last point made by counsel and just say that it's
22 actually false that the FINRA ruling concerns anything
23 in the articles by Bill Meagher. The FINRA ruling has
24 to do with other transactions by Scottsdale Capital and
25 has zero to do with any of the allegations in the Bill

1 Meagher articles. So that is just patently false.

2 I'll start with relatedness since the Court
3 seems to want to focus on that. The issue of
4 relatedness, and this comes from the Swiss American Bank
5 case, it's got to do with the nexus between the forum
6 contacts and the cause of action. And the fact of the
7 matter is the, and this I'm quoting Kim v. Vaglis (ph),
8 District Court of Massachusetts. "In order to satisfy
9 relatedness requirement, the evidence produced that
10 supports specific jurisdiction must show that the cause
11 of action either arises directly out or is related to
12 the defendant's forum base contacts." That's simply
13 because we don't want to be suing The Deal for a slip
14 and fall case in New Hampshire that's not related to its
15 sale of the subscription to Dartmouth College. This is
16 a related matter because it arises directly from The
17 Deal's decision to gain financially by entering into a
18 contract with a New Hampshire resident. It's not a slip
19 and fall case against them or anything else. It's
20 completely related to their activities in the state, and
21 that is the relatedness prong.

22 Defendants say --

23 THE COURT: But their activity --

24 MR. SUSMAN: Yes.

25 THE COURT: Say that again.

1 MR. SUSMAN: It arises --

2 THE COURT: It was The Deal's decision to I
3 guess, I don't know, profit by entering a subscription
4 deal with a subscriber in New Hampshire, right?

5 MR. SUSMAN: Correct. And then based on that
6 they then delivered to --

7 THE COURT: You haven't alleged any conduct by
8 the defendants based on their business dealings in New
9 Hampshire. You've alleged defamation.

10 MR. SUSMAN: Correct, that they put into
11 circulation in New Hampshire and that remains in
12 circulation in New Hampshire as a result of that
13 contact. They entered into a contract with the largest
14 private college in New Hampshire that has over 7,000
15 students and faculty that could at any given moment and
16 maybe already has, someone has accessed one of the three
17 defamatory articles. So it arises -- it's related to
18 their contact with New Hampshire.

19 When defendants say that plaintiffs' claim is
20 not related because there is no injury --

21 THE COURT: What conduct are you alleging in
22 your complaint that either arises from, not has impact
23 in, arises from or is related to their conduct in New
24 Hampshire or with New Hampshire? I mean, it's not -- to
25 say it arises from implicates it's conduct in New

1 Hampshire. It's conduct that's actionable that you sued
2 them for. You can sue them for doing business in New
3 Hampshire or breaching a business arrangement in New
4 Hampshire or undertaking any sort of conduct in New
5 Hampshire. It's conduct that I guess potentially could
6 have effects felt in New Hampshire or impact in New
7 Hampshire, but that's not the, that's not what the case
8 arises from.

9 MR. SUSMAN: The case arises from -- the case
10 arises from -- and this again, it gets back to how
11 relatedness is connected to the purposeful availment.

12 THE COURT: Sure.

13 MR. SUSMAN: But the fact of the matter is The
14 Deal decided that it wanted to benefit financially by
15 entering into a contract with a resident in New
16 Hampshire. They believed that that's in their financial
17 interest. If they did not expect to ever be sued in New
18 Hampshire, it was completely within their control.

19 THE COURT: That's purposeful availment.

20 MR. SUSMAN: That is purposeful --

21 THE COURT: That is not relatedness.

22 MR. SUSMAN: You are correct. So once they
23 entered into that contract, though, with Dartmouth
24 College and circulated to New Hampshire, had they not
25 entered into that contract, willfully entered into that

1 contract, the articles at issue never would have been
2 circulated in New Hampshire. They did and they have.
3 And that's why it's related to the conduct in New
4 Hampshire.

5 And to focus on the harm caused in New
6 Hampshire, that conflates relatedness with the effects
7 test which is something the court in Swiss American Bank
8 warned against.

9 THE COURT: Sure. But I thought you were the
10 one doing that.

11 MR. SUSMAN: I'm not the one doing that.

12 THE COURT: From my perspective you're the one
13 conflating. I mean, because nothing about the -- I'm
14 just trying to think of an analogy, probably should have
15 thought of this before we had oral argument, but I'm
16 trying to think of an analogy for what you're
17 suggesting, but I'm not going to try to slow you down on
18 this.

19 Tell me -- how is it they're conflating and
20 you're not? Because my view is, if you want to talk
21 about, you know, an expectation about being hailed into
22 court because they made a contractual agreement in New
23 Hampshire that has nothing to do with this defamatory
24 conduct, that to me sounds like you're conflating
25 relatedness and purposeful availment. Why did the

1 defendants and not you --

2 MR. SUSMAN: No, no, no, I'm not -- no, no, I
3 think that relatedness and purposeful availment are
4 definitely conflated. I'm saying that they focus on the
5 injury caused, the damage in the state, the effects.
6 They're trying to focus on the effects test, and that's
7 what should not be conflated with relatedness.

8 THE COURT: Okay, I'm with you.

9 MR. SUSMAN: That's my point. I should also
10 say that defendants' reliance on Christian v. Barricade
11 Books is completely misplaced. It wasn't that the books
12 in New Hampshire remained unsold. It was the books
13 remained unsold and were shipped out of state. They
14 were removed from circulation in the state of New
15 Hampshire so that no one could purchase them.

16 The difference here is the circulation
17 remains. It's not as though The Deal has taken down the
18 defamatory articles. They're still here in the state
19 because of the contract.

20 And finally there's the issue in terms of
21 relatedness that defendants have not really even
22 established, and this would be a point of jurisdictional
23 discovery regarding who among the 7,000 students and
24 faculty at Dartmouth has access to the subscription, who
25 can access it, who currently has access to it and who

1 could.

2 They also haven't even looked at the ISPs of
3 those who did access it because they say, and I'm
4 getting a bit into the weeds here, but they say that the
5 December 6th article was viewed a total of 101 times by
6 everyone. That's everyone in the world where they have
7 the article has been viewed. Only 24 of those times
8 were with authorization codes, 77 they say do not have
9 authorization codes. Those 77, who were people that
10 were accessing these articles without authorization
11 codes. We would have to do jurisdictional discovery to
12 the ISP addresses of where those people are located.
13 The point being when they focus on the Dartmouth
14 authorization did not access the articles, they're not
15 giving you have the full story.

16 THE COURT: So tell me the full story in the
17 best case scenario for you.

18 MR. SUSMAN: The full story is that it seems
19 as though the majority of people that accessed these
20 articles did not even have authorization. So, all I've
21 got to do is some jurisdictional discovery as to the ISP
22 addresses of the people that did access the articles.

23 THE COURT: What's your best case scenario?

24 MR. SUSMAN: That there will be --

25 THE COURT: All of them would be --

1 MR. SUSMAN: Seventy-seven in New Hampshire
2 would be the best case scenario, but one in New
3 Hampshire would be sufficient. And again, none of this
4 would have happened but for -- but for defendants'
5 decision to enter into a contract in New Hampshire with
6 Dartmouth College. Clearly they are receiving a benefit
7 from it and they should not be surprised to be brought
8 into court in New Hampshire.

9 If I could focus a little bit on the
10 purposeful availment prong. The defendants concede that
11 The Deal falls on the interactive side of the Zippo
12 scale. That's not even in dispute here. And when you
13 have a website that falls within the interactive scale,
14 that in and of itself shows a, quote, manifest intent of
15 targeting the state. And that comes from Carefirst of
16 Maryland v. Carefirst Pregnancy Center. And that can be
17 determined, targeting the state can be determined by the
18 character of the website at issue.

19 Again, even if one were to focus on numbers,
20 one sale in the state is sufficient, particularly if
21 it's to a school of 7,000 students and faculty, the
22 largest private college in the state. That's why Zippo
23 says the test for minimum contact has always focused on
24 the nature and the quality of the contacts with the
25 forum and not the quantity. And that's why case after

1 case it's said that even a single, and this comes from
2 Burger King, even a single substantial act directed
3 toward the forum can support specific jurisdiction. And
4 that's why in other cases such as American Network, Inc.
5 v. Access America Connect there were six New York
6 subscribers, and PS Productions v. Maxell Corp. there
7 was two sales in Arkansas.

8 Over and over again the question is they keep
9 focusing on this number, but the number is not just a
10 single one. The number should be looked at in terms of
11 the fact that this is an interactive website. That,
12 again, this is based upon the Zippo scale, the nature
13 and the contact of it was a subscription with the state
14 of New Hampshire. This is not your typical, as you
15 said, as the Court said, a magazine that arrived in a
16 brown paper bag.

17 And finally if I may look at the
18 reasonableness of the exercise of personal jurisdiction.
19 The burden on the defendant seems to be one of the main
20 things that the defendants focus on. As we stated in
21 our papers, according to defendants we should have
22 either sued in California or New York. If we were to
23 sue in New York, Bill Meagher would have to come to New
24 York. If we sued in California, The Deal would have to
25 come to California. Litigating the matter in New

1 Hampshire does not impose a burden on the defendant.

2 This is a --

3 THE COURT: You don't have a case under the
4 statute of limitations.

5 MR. SUSMAN: I do -- oh, pardon me?

6 THE COURT: I thought the statute of
7 limitations --

8 MR. SUSMAN: Well, that would be the problem,
9 yes. And that's why --

10 THE COURT: Which is why you're here.

11 MR. SUSMAN: For plaintiffs to have effective
12 relief, one of the Gestalt factors is the statute of
13 limitations, which is one of the reasons why we're here.

14 But if you look at Fagan v. Kelly, they said
15 that a New Jersey resident, it did not impose the burden
16 on them, a significant burden on the defendant to
17 litigate the matter in New Hampshire.

18 THE COURT: Well, in terms of burdens, I mean,
19 I assumed that The Deal is indemnifying this reporter
20 and providing a defense, right?

21 MS. McNAMARA: Correct, your Honor.

22 THE COURT: So, you know, you don't need to
23 focus on burden too much.

24 MR. SUSMAN: Okay. Then I will focus on this
25 conspiracy theory that the plaintiffs are out to harass

1 Mr. Meagher.

2 THE COURT: Well, what about this New York
3 situation? Tell me about this New York situation where
4 on the eve of the due date to a motion to dismiss you
5 folks nonsuited -- you dismissed your case.

6 MR. SUSMAN: That's correct, your Honor.

7 THE COURT: Were you lead counsel in that
8 case?

9 MR. SUSMAN: I came in -- I was not when it
10 was originally filed. I came in --

11 THE COURT: You were when it was dismissed.

12 MR. SUSMAN: I was, dismissed and refiled
13 here, yes, your Honor.

14 THE COURT: That really strikes me as
15 gamesmanship. I mean, why would you ever conduct
16 yourself that way?

17 MR. SUSMAN: In what way? I wanted to --

18 THE COURT: You read their brief, right?

19 MR. SUSMAN: I did indeed.

20 THE COURT: Don't say you don't know what I'm
21 talking about. You waited until the day before their
22 motion to dismiss was due. So they put all the time and
23 resources into drafting it, you knew it was coming, and
24 then you dumped your case. That strikes me that, you're
25 about to tell me why it's not, but that strikes me on

1 the printed page as you playing games and trying to
2 harass and being burdensome. So explain to me why it
3 wasn't.

4 MR. SUSMAN: Because, your Honor, we had given
5 them multiple months and months and months of extensions
6 to file their motion, and in fact we were on the verge
7 of giving them another one, and at that point we decided
8 it was better to just dismiss the case and refile it
9 here.

10 THE COURT: Because?

11 MR. SUSMAN: Based on the statute of
12 limitations.

13 THE COURT: Okay.

14 MR. SUSMAN: If the Court has any questions.

15 THE COURT: Well, I'm actually somewhat
16 persuaded by your argument as to the decision by
17 Dartmouth to -- the decision by Dartmouth to do business
18 in New Hampshire. I mean not by Dartmouth, I'm sorry,
19 by the defendants to do business in New Hampshire with
20 Dartmouth. But to me if it gets you anywhere, it gets
21 you somewhere on purposeful availment, not so much on
22 relatedness. I'm still struggling with the concept. I
23 guess I need some kind of authority or precedent for the
24 proposition that those -- that that decision alone to
25 contract with a New Hampshire subscriber goes to

1 relatedness, because it seems to have nothing whatsoever
2 to do, to the Court anyway, to your claims, which are
3 for defamation. They're not a breach of contract. They
4 have nothing to do with the formation of that Dartmouth
5 contract, the execution of that Dartmouth contract,
6 anything about the Dartmouth contract except I guess in
7 some very attenuated way providing contact to Dartmouth
8 through the subscription, right?

9 MR. SUSMAN: Right, that's the nexus. That is
10 the direct -- that there is a direct line between The
11 Deal entering into a contract with Dartmouth and its
12 circulating defamatory articles here. Remember the --
13 I'm going to assume that they have no subscribers in
14 Montana, therefore there is no relatedness to suing --
15 there would be no relatedness to suing defendants in
16 Montana because the articles are not in circulation
17 there. They are in circulation here and they are
18 available to over 7,000 New Hampshire residents because
19 of --

20 THE COURT: But what if the Tuck School of
21 Business has, you know, hundreds maybe thousands of
22 alums in Montana who access through Dartmouth
23 subscription The Deal, right, they are authorized users
24 because they've got the magic number. Wouldn't you say
25 under that circumstance that you've got relatedness in

1 Montana?

2 MR. SUSMAN: I would have relatedness but not
3 purposeful availment.

4 THE COURT: I'm sorry. Thanks -- no.

5 MR. SUSMAN: Yes.

6 THE COURT: Not purposeful availment because
7 they haven't contracted with, all right. You would have
8 relatedness.

9 MR. SUSMAN: I would have relatedness. I
10 think that's a great example, your Honor, because that
11 shows relatedness but not purposeful availment. And
12 that's why here we have both purposeful availment and
13 relatedness.

14 THE COURT: I'm not sure you have either, but
15 I --

16 MR. SUSMAN: I appreciate your candor.

17 THE COURT: Well, you're going to have to give
18 me an answer at some point anyway, right?

19 MR. SUSMAN: Thank you, your Honor.

20 THE COURT: Thank you.

21 MS. McNAMARA: Your Honor, if I may just very
22 briefly.

23 THE COURT: You may, of course.

24 MS. McNAMARA: Thank you, your Honor. I want
25 to I think focus on what was emphasized I think with the

1 Court's questions and my adversary's commentary.

2 You know, as I said earlier, you have to look
3 at the whole. And the way the purposeful availment as
4 well as the relatedness, they all intersect and interact
5 with one another and no facts can be taken in isolation
6 and becomes determinative.

7 It is not simply that there is circulation or
8 theoretical, because what we're dealing with here, what
9 the facts, the evidence before the Court, is that there
10 is a theoretical circulation. So the mere act of making
11 a contract with Dartmouth on these -- in this state did
12 not cause any actual injury since we know for a fact
13 from the evidence that no user at Dartmouth accessed the
14 article.

15 THE COURT: We know that for a fact based on
16 the evidence we have so far, but what about the idea of
17 unknown ISPs? What about the idea of --

18 MS. McNAMARA: It's not possible, and that's
19 where I think --

20 THE COURT: Oh.

21 MS. McNAMARA: -- my adversary is misstating
22 the record.

23 THE COURT: Okay.

24 MS. McNAMARA: And I can show you and the
25 Court can focus if it wishes on the Lundberg declaration

1 that was put into evidence in support of the motion.

2 THE COURT: Right.

3 MS. McNAMARA: And it's clear that it is not
4 an interactive website in the way Mr. Susman is
5 confusing the Zippo line of cases where there's a public
6 website and it interacts with the public and any person
7 can go to the website and can draw down information.

8 That's not the case here. These are articles
9 that are behind pay walls that no one has access to
10 whatsoever. The 6,000 students at Dartmouth do not have
11 access to this subscription, could never today, tomorrow
12 or the next day have access to these articles. They
13 have to be an authorized user that Dartmouth has
14 identified through its subscription to have access to
15 the articles.

16 THE COURT: Wait a minute. That's because an
17 authorized user gets a password.

18 MS. McNAMARA: Correct.

19 THE COURT: Right? So, if somebody who is
20 authorized at Dartmouth gave Steve Gordon the password,
21 he's not an authorized user but he can view it, and if
22 his ISP shows up on the cyber trail and, you know, he's
23 a possible -- he's a possible source of damages for this
24 case. He's a possible example of effects in this case.

25 MS. McNAMARA: Well, I don't think you can

1 establish jurisdiction at this juncture on a theoretical
2 future when the facts before the Court are unequivocal.

3 THE COURT: No, they're not unequivocal.
4 You're asking me to rule on an affidavit by your client.
5 And I'm asking you, and I just gave you a hypothetical
6 that I think you've just acknowledged not, and not in an
7 evasive way -- well, yeah, in an evasive way, but
8 appropriately evasive way, that you can't eliminate.
9 Plenty of people -- that's why I asked adverse counsel
10 that question. Was it 71, 111?

11 MR. SUSMAN: 110 overall and then 77 that were
12 not registered users.

13 MS. McNAMARA: This is 110 throughout the
14 world, your Honor, this is not --

15 THE COURT: That's the problem. We don't know
16 where the 110 are.

17 MS. McNAMARA: We do know. We do know. In
18 the affidavit there's 101 people looked at the December
19 6 article.

20 THE COURT: Right.

21 MS. McNAMARA: Authorization codes were
22 attributed to 24 of those to major law firms and
23 financial consultants, none of which were in New
24 Hampshire. The remaining 77 cannot be attributed to the
25 Dartmouth account because they had no authentication

1 code in order to get access somehow.

2 THE COURT: I see.

3 MS. McNAMARA: And that Dartmouth had an
4 authentication code, the only way you would get access
5 is through the authentication code that ends with zero.
6 That is -- those are the facts. Those are what's before
7 there. But the important point here is not simply that
8 you have a subscription and a determination to contract
9 with an entity in the state of New Hampshire. What
10 these cases teach us is you need to look at the whole,
11 and that invariably there's not a precedent, there's not
12 a case they have cited, and we're not aware of a case
13 where a single subscription has been sufficient to give
14 rise to personal jurisdiction.

15 THE COURT: Understood. But I think single
16 subscription in this context is probably -- don't I have
17 to view this as at least --

18 MS. McNAMARA: Forty.

19 THE COURT: -- forty subscriptions.

20 MS. McNAMARA: Okay, and there's no precedent
21 for that that they've cited, where standing alone that
22 was the only evidence. They have not cited a single
23 case. All the Zippo line of cases that they've talked
24 about where there was interactive websites and that
25 there are subscriptions, you go down the roster of every

1 case they've cited, and in each and every one not only
2 do they invariably have more subscribers than, if you
3 want to use the 40 number, than the 40, but in each and
4 every case the plaintiff resided in the jurisdiction at
5 issue. The plaintiff was injured.

6 So that if you take Zippo itself, the reason
7 why there is a relatedness and the connection there is
8 that the plaintiff lived in Pennsylvania, there were
9 3,000 subscriptions to Pennsylvania. So at least 3,000
10 readers did or could have read, and the plaintiff was
11 personally injured by virtue of that readership in the
12 state in which he resided. That is the -- that's how
13 you marry this together.

14 Here we have nothing. We have one
15 subscription and 40 theoretical users, none of which
16 actually read any of the three articles, and no
17 plaintiff, nothing else. There's nothing else to speak
18 to personal jurisdiction other than a single what I
19 would say fortuitous commercial relationship of one
20 subscriber in the state period. That's it. It's not a,
21 you know, and he keeps going back to interactive
22 websites and theoretical people, the 6,000 users. No,
23 you have to be an authorized user.

24 THE COURT: Yeah.

25 MS. McNAMARA: So, it just doesn't add up,

1 your Honor. And I would just finally say, because I
2 don't want to, for anybody to say that I've
3 misrepresented anything to the Court.

4 THE COURT: Yeah.

5 MS. McNAMARA: The judgment, the ruling by
6 FINRA in fact did involve an egregious finding of
7 ignoring red flags, whether it was the specific same red
8 flags identified in this article I can't stay, but there
9 was -- Mr. Hurry had been banned from the securities
10 industry and a \$1.5 million fine against him based upon
11 in part ignoring egregious red flags of potential
12 security fraud. So, I would think in any --

13 THE COURT: With respect to the transactions
14 that were the subject of these alleged by defamatory
15 articles?

16 MS. McNAMARA: I haven't --

17 THE COURT: That's what he's saying.

18 MS. McNAMARA: That's what he's saying, but I
19 think that the decision, which I actually have here,
20 your Honor, it's a very long decision and I don't know
21 whether it got into the Biozoom transaction --

22 THE COURT: Respectfully, respectfully, and I
23 mean this respectfully, I'm not trying to be a wise guy,
24 I expect you to have read that and tell me, not vice
25 versa.

1 MS. McNAMARA: Exactly, your Honor. Oh, I'm
2 not suggesting that you --

3 THE COURT: I know, so you're telling me you
4 don't really know if it's the same red flags. He's
5 standing up saying it's different facts. It's different
6 I guess malfeasance that led to that fine and his
7 termination from the exchange. And if it's different,
8 it's different. I don't know. And you don't know
9 either apparently.

10 MS. McNAMARA: Well, it's clearly sufficiently
11 related since the whole connection between all the
12 flurry of litigation is the desire, the claim -- the
13 plaintiffs' claims against FINRA in Arizona where they
14 are seeking to find my client's confidential source.

15 THE COURT: Yeah.

16 MS. McNAMARA: That clearly there's --

17 THE COURT: A little smoke there.

18 MS. McNAMARA: There is nexus. And I'm happy
19 to address any other questions that the Court has.

20 THE COURT: I think I'm good.

21 MS. McNAMARA: Great. Thank you very much,
22 your Honor.

23 THE COURT: Give me a moment.

24 MR. SUSMAN: Your Honor, may I have one
25 moment?

1 THE COURT: Oh, you can all -- we're here.
2 I'm going to listen to you.

3 MR. SUSMAN: Thank you. One thing. I just
4 want to quote from the Keeton case where it says that it
5 is undoubtedly true that the bulk of the harm done to
6 petitioner occurred outside of New Hampshire, but that
7 would be true in almost every libel action brought
8 somewhere other than the plaintiff's domicile.

9 THE COURT: Sure.

10 MR. SUSMAN: I just want that to be clear.
11 Finally I just want to say that --

12 THE COURT: But there were thousands of
13 subscriptions in Keeton.

14 MR. SUSMAN: Correct.

15 MS. McNAMARA: Ten to fifteen thousand.

16 MR. SUSMAN: And in this case The Deal has
17 less than 700 subscribers overall worldwide.

18 THE COURT: So you're saying by percentages --

19 MR. SUSMAN: Exactly. If you're comparing
20 apples and oranges.

21 And if the Court is inclined to grant the
22 motion, I would ask that the Court at least consider
23 allowing plaintiffs to take some jurisdictional
24 discovery regarding The Deal's advertising and
25 solicitation regarding the number of, you know, where

1 the articles were accessed, ISPs, how the articles were
2 delivered, what circulation actually --

3 THE COURT: Hold on, let me -- I'll be honest
4 with you, you know, that's why Mr. Hawkins is here.
5 He's supposed to know the rules in New Hampshire. I'm
6 not suggesting you don't. But look, you want
7 jurisdictional discovery. Our rules are you've got to
8 file a motion to ask for jurisdictional discovery. It's
9 not tacked on at the end of your motion, objection to
10 motion to dismiss. I see it all the time in motions to
11 amend. It's becoming more of a problem around here
12 where people move to dismiss and the plaintiff comes
13 back and objects and there's a reply and a surreply at
14 the very end, by the way, judge, if you decline to
15 dismiss this case I'd like to amend. That's just not
16 the way it works.

17 So, I'm disinclined to allow it, but I guess
18 I'm inclined enough to ask you to start over with that
19 list of what you hope to do.

20 MR. SUSMAN: Thank you very much for indulging
21 me. I would take jurisdictional discovery regarding The
22 Deal's advertising and solicitation in the state; how it
23 is that Dartmouth College even got the subscription in
24 the first place; how the articles are delivered. I'd
25 like to actually see the contract with Dartmouth

1 College. And --

2 THE COURT: You said how the articles.

3 MR. SUSMAN: The articles themselves, how
4 they're delivered. Do they come in an email blast. Can
5 people sign up for the email blast. Is there simply
6 that you have to look it up. Is it on the -- I don't
7 know the answers to these questions.

8 THE COURT: Understood.

9 MR. SUSMAN: And I think they're all relevant
10 both to purposeful availment and relatedness. And
11 finally, and like I said, the ISP addresses of the
12 people who did access the articles I think would be very
13 important.

14 THE COURT: Well, what we do know, what we do
15 know and which I don't think you contest is what Ms.
16 McNamara told me is that those ISP addresses, the 71,
17 right, those are -- those are not -- they are not ISP
18 addresses that access these, this publication because
19 nobody accessed the articles as far as we know, right?

20 MS. McNAMARA: Correct.

21 THE COURT: Wait a minute. See, I'm getting
22 -- those floating ISP addresses, they didn't come
23 through any access code, though, right? Isn't that the
24 case?

25 MS. McNAMARA: Your Honor, the 71 did not have

1 an access code and so they were not Dartmouth because
2 Dartmouth had an access code in order to get it.

3 THE COURT: But everybody had an access code,
4 right?

5 MS. McNAMARA: Correct. It's just that they
6 weren't access codes that were identified, that they
7 could readily identify with a particular subscriber,
8 whereas they could readily identify one of those 71s if
9 any of them had been the Dartmouth access code if you
10 follow me.

11 THE COURT: Yeah, but if, and the mystery is
12 71, right?

13 MS. McNAMARA: The mystery is 71.

14 THE COURT: The mystery -- not a mystery, I'm
15 sorry --

16 MS. McNAMARA: It's not a mystery. We know
17 it's not Dartmouth.

18 THE COURT: No, that's the problem. You don't
19 know it's not Dartmouth. You know it's not -- if they
20 didn't come through any access code, you know it's no
21 particular subscriber, or don't you? I don't know. Do
22 all subscribers have the access code that their users
23 use or are there --

24 MS. McNAMARA: All subscribers have to have
25 some kind of access, but they don't all necessarily have

1 a -- have an authentication code. And in order to
2 access Dartmouth, they have an authentication code. So
3 I guess the way to describe it is this way. I can
4 personally have an access code, I could personally
5 subscribe, but I wouldn't have an authentication code
6 because I'm an individual and I'm not an entity.

7 THE COURT: Access towards when an entry
8 supplies its, you know, its members --

9 MS. McNAMARA: Correct. So that if you're an
10 institution or you're a financial institution or in this
11 case an educational institution, you get an
12 authentication code and you authorize a certain number
13 of users to use that authentication code. Here there
14 were 40 authorized users. And so in order to go through
15 Dartmouth the authentication code would have to show up,
16 and it did not as to any of these three articles.

17 THE COURT: Yeah.

18 MR. SUSMAN: I'm a bit baffled now because
19 according to defendants' pleadings the majority, the
20 vast majority of all their subscribers are institutions,
21 yet the vast majority of people who accessed these
22 articles I'm now hearing were not institutions.

23 THE COURT: No, well, I don't know.

24 MR. SUSMAN: I don't know.

25 THE COURT: Let's try it this way. Here's the

1 thing. When I asked you what you want to do discovery
2 on, you gave me a laundry list and I wrote them down
3 because I want to give them some thought, but they're
4 all focused, see, they're all focused on the contract,
5 right? The Deal/Dartmouth contract. Which seems to me
6 if I understand your papers correctly, they're the
7 thrust of your relatedness argument. It's that
8 contract. It's that relationship that The Deal had with
9 Dartmouth College and I guess its authorized users
10 through the subscriptions, right? That's sort of my
11 first observation about it.

12 My second observation or my question to you is
13 let's suppose I said, sure, jurisdictional discovery on
14 whatever issues including the mystery 71, right? The
15 ISPs that are not affiliated with some institution or
16 some, I'm not sure I understand it, but not affiliated
17 with some subscriber, what would you, I mean, so you get
18 the ISP addresses, right? I guess you researched them.
19 If they can attach them to a specific person or user,
20 they provide that under a protective order I guess, how
21 does this play out for you in a way that strengthens
22 your jurisdictional argument?

23 MR. SUSMAN: It strengthens the relatedness
24 article, prong of the argument.

25 THE COURT: But what facts? Like what facts

1 would do that?

2 MR. SUSMAN: Because one of the things or the
3 primary fact that I hear defendants relying on is that
4 no one in the jurisdiction accessed the article, so
5 therefore it's not related. There is no injury, no
6 relation. And I'm saying if there was in fact an access
7 in New Hampshire, that would eviscerate that argument.

8 MS. McNAMARA: But your Honor, we have no
9 subscribers in New Hampshire other than Dartmouth, so I
10 don't know how this theoretical exploration of the 71
11 ISPs --

12 THE COURT: But are these ISP subscribers? If
13 they were subscribers you would know who they are,
14 they're not mysteries. So they could be anybody. And,
15 we all know this is not the case, but if every single
16 one of them happened to be in the Granite State,
17 wouldn't that impact my -- wouldn't that impact the
18 relatedness -- if they are not subscribers, I guess it
19 doesn't go to purposeful availment, I'm with you there,
20 but couldn't they go to relatedness if they're all in
21 New Hampshire?

22 MS. McNAMARA: I think we're talking about, I
23 mean, I don't see how that can be because I don't see,
24 if they have a list of all their subscribers and there's
25 no subscriber who identifies themselves as being a

1 resident of New Hampshire, then I don't see how any of
2 the 71 could be New Hampshire. I just -- I'm at a loss
3 to understand how you could theoretically get there.

4 THE COURT: Well, you don't know who the --

5 MS. McNAMARA: Well, we do know who the
6 subscribers are. We know who the subscribers are.

7 THE COURT: But there are 71 people who have
8 seen these articles that aren't subscribers, right?

9 MS. McNAMARA: No, no, they are subscribers.
10 They're subscribers. All the 71 are subscribers. The
11 only distinction between, that I understand, the only
12 distinction between something like Dartmouth and a small
13 subscriber is --

14 THE COURT: If they're -- wait a minute.
15 Stop. If they're subscribers, how is this a mystery?
16 You know who they are.

17 MS. McNAMARA: It's not -- then that's why we
18 say none of them are New Hampshire. They are not
19 attributed to Dartmouth. We don't have any subscribers
20 in New Hampshire.

21 THE COURT: It's not just that they're not
22 attributed to Dartmouth, he's saying that they're
23 unidentified.

24 MS. McNAMARA: What it says, and I'm reading
25 --

1 THE COURT: Wait a minute. Stop. We're just
2 talking past each other. If there's not a mystery about
3 who these ISP addresses are affiliated with, then
4 there's not a mystery. But if you know they're not
5 Dartmouth, which I understand because they didn't come
6 in through a Dartmouth access code, right, are you
7 saying that they are not subscribers or they are
8 subscribers?

9 MS. McNAMARA: They are subscribers. They
10 originated from subscriber accounts, but they were
11 subscriber accounts that did not have authentication
12 codes, okay?

13 THE COURT: So we're back to you now. If they
14 know who the subscribers are and they're telling us
15 they're not New Hampshire subscribers, what's the
16 mystery?

17 MR. SUSMAN: Then --

18 THE COURT: There is none.

19 MR. SUSMAN: I'd say there is none. Let me
20 just say one other thing. But regarding jurisdictional
21 discovery, though, there's the issue of how the articles
22 are delivered. And the reason why this is important is
23 because it's not necessary to access the articles.

24 THE COURT: Sitting in New Hampshire.

25 MR. SUSMAN: No, no, no. It's not necessary

1 to access the articles to receive defamatory material
2 because, again, if it appears on the head --

3 THE COURT: It's on the banner of an email.

4 MR. SUSMAN: Exactly. The headlines --

5 THE COURT: That one might click on, right?

6 MR. SUSMAN: The headlines of the articles are
7 defamatory. One of the headlines says my clients were
8 investigated by the FBI and the SEC. Patently false.
9 So, if you open up The Deal's website, and again, I
10 don't know how it's delivered, is it an email blast, is
11 it on the front page that says, you know, your daily
12 round up and here's what Bill Meagher is saying about,
13 you know, my clients, then if it's just showing the
14 headline alone, the damage has already been done. And
15 in fact, that could still be on their website. I don't
16 know. I don't know exactly how it would look to a
17 subscriber because I'm not one.

18 THE COURT: Let me just take a step back here
19 as I continue to contemplate the unlikely event of
20 jurisdictional discovery here.

21 I'm just trying to imagine, I mean, if one can
22 be defamed by the headlines, I mean, I don't know how
23 The Deal, I feel like I've seen references in my life to
24 The Deal, you know, out there reading emails and reading
25 the internet, and I'm not a person who's focused on the

1 market even slightly, okay, slightly, zero interest, you
2 know, but I feel like I've seen it somewhere, and what
3 I'm wondering is, are there constantly emails being
4 blasted, broadcast all over the country that have, you
5 know, all the articles listed and, you know, to
6 subscribe, click here. I mean, how does that work?

7 MS. McNAMARA: Okay, your Honor, that's
8 answered in the declaration as well if you focus on
9 paragraph 11 and 12 --

10 THE COURT: Go ahead.

11 MS. McNAMARA: -- of the declaration. Readers
12 receive access or knowledge concerning articles in one
13 of two ways. Either they can access through the online
14 portal and then they have to put in their subscriber
15 number and then pop up, and yes, there would be listings
16 of articles, but again, you'd have to have the initial
17 impetus done --

18 THE COURT: You're talking about readers.

19 MS. McNAMARA: Right.

20 THE COURT: So respectfully you're not
21 answering my question. I'm talking about how the
22 publication is marketed to the --

23 MS. McNAMARA: Oh marketed, I'm sorry, your
24 Honor. Okay.

25 THE COURT: Yeah, my bad. But you see what

1 I'm asking then?

2 MS. McNAMARA: Yes, absolutely.

3 THE COURT: If one can be defamed by
4 headlines, if these headlines are contained in marketing
5 materials that are broadcast all over the internet in
6 various ways --

7 MS. McNAMARA: It's not.

8 THE COURT: It's not.

9 MS. McNAMARA: It's this -- that's why
10 Dartmouth was not a subscriber through kind of the, like
11 the Zippo line of cases where you have interactive
12 websites and people have access to something that's
13 available on the World Wide Web and then you achieve an
14 interest and you connect and you subscribe. As is clear
15 here, the subscription was with Dartmouth, and virtually
16 all subscriptions either happened at trade shows,
17 financial industry trade shows, or there's actual
18 solicitation done by the people who sell the
19 subscription so that they're calling up financial
20 institutions and the like around, you know, that they
21 think would be likely subscribers of the publication,
22 and so it's not just out there. Whether, you know,
23 whether you can, you could go to The Deal --

24 THE COURT: But is this in the record
25 somewhere? Is this in the declaration? Because I don't

1 think it is, this issue of marketing. Not that it
2 should be, by the way, I'm just --

3 MS. McNAMARA: I believe it is, actually.

4 THE COURT: He's describing to me what he'd
5 like to do in terms of jurisdictional discovery.
6 There's also the question about whether any of this is
7 alleged in the complaint. But I'm not sure it needs to
8 be --

9 MS. McNAMARA: It's not alleged in the
10 complaint. But I do, okay, I do, paragraph eight of the
11 declaration indicates The Deal does not mass market its
12 service to potential subscribers, but rather solicits
13 new customers through direct sales outreach targeting
14 the customers --

15 THE COURT: Yeah, I did read that.

16 MS. McNAMARA: -- i.e. major banks, law firms,
17 hedge funds, through conferences and other establish
18 business channels. Virtually all of the direct
19 marketing efforts are focused on New York with some
20 activity targeted in California. The Deal has never
21 directly marketed its product to potential subscribers
22 in New Hampshire.

23 So it is addressed, your Honor, and there's
24 nothing to discover about it.

25 THE COURT: All right. Is there something

1 else you want to say?

2 MR. SUSMAN: No, it doesn't answer the
3 question, though, how they ended up with a subscriber
4 with 6,000 students and potential people that access it
5 in New Hampshire. And we still don't know why is it,
6 you know, we get this number of 6,000 students but only
7 40 students have access to it. We don't how it is that
8 6,000 don't have access to it or could access it at any
9 time.

10 And again, I would just like to know because
11 if the headlines themselves are defamatory, we're not
12 understanding how The Deal is published and circulated
13 in the state. We would need discovery on that.

14 THE COURT: We've kind of circled back to my
15 original question at the beginning of this hearing about
16 who at Dartmouth is reading this material. Is it
17 students, is it faculty, is it alumni, is it portfolio
18 managers. It doesn't sound like it's that, doesn't
19 sound like it's the last thing I mentioned. But, you
20 know, 40, I don't know, 40 might be 40 professors who
21 have students and they forward this stuff to students, I
22 don't know. I don't want to make up facts and add them
23 to the jurisdictional analysis, but this is an area
24 where it's just not completely clear to the Court.

25 I do think some extra focus on that

1 declaration is warranted, though, because a couple of
2 times I've asked questions about a declaration I've
3 already read and you were able to focus me on the answer
4 that was in the declaration, so I appreciate that.

5 All right, let me take a little break here. I
6 want to just talk to my law clerk and maybe rejoin you
7 in five minutes -- do you have five minutes to wait?

8 MS. McNAMARA: Absolutely, your Honor.

9 MR. SUSMAN: Yes.

10 THE COURT: Let's take a little recess.

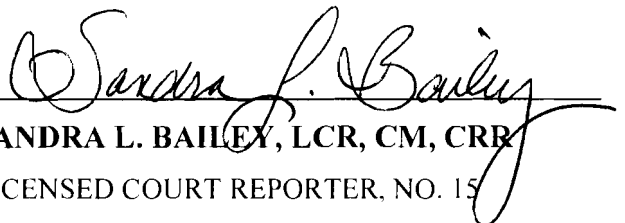
11 (Recess taken.)

12 (Adjourned at 11:35 a.m.)

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14
15 C E R T I F I C A T E

16
17 I, Sandra L. Bailey, do hereby certify that
18 the foregoing transcript is a true and accurate
19 transcription of the within proceedings, to the best of
20 my knowledge, skill, ability and belief.

21
22
23 Submitted: 5/19/2017

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25

SANDRA L. BAILEY, LCR, CM, CRR
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